

NO. 45124-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JEREMIAH CROWELL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA
COUNTY

HONORABLE JUDGE BRIAN P. ALTMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court abuse its discretion by allowing in evidence, under the "excited utterance" exception to the hearsay rule, a recorded out-of-court statement made by the complaining witness, when the complaining witness did testify at trial?

2. Was trial counsel ineffective in failing to object to the admission, under the "excited utterance" exception to the hearsay rule, of an out-of-court statement made by the complaining witness, when the complaining witness did testify at trial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On January 3, 2013, the appellant, Jeremiah Crowell, was charged by information with one count of Rape of a Child in the Third Degree. CP 1-2. He was arraigned on January 17, 2013 and entered a plea of Not Guilty. CP 3.

By stipulation, a hearing under CrR 3.5 was ordered to be set. CP 13. The hearing was held on February 26, 2013. CP 21-23, RP (February 26, 2013) 5-84. The State stipulated that the statement at issue would not be admissible in its case-in-chief but argued that it should be admissible for impeachment. CP 21, RP (February 26, 2013) 5. Sgt. Buettner testified for the State. RP

(February 26, 2013) 14-64. Crowell testified on his own behalf. RP (February 26, 2013) 66-73. The Court ruled that Crowell's recorded statement would be admissible for impeachment purposes. RP (February 26, 2013) 84.

On April 22, 2013, the State moved to amend the information, CP 55-56, 62. The Court granted the State's motion to amend the information. CP 62-63, 66. The amended information added counts of Rape in the Second Degree and Assault in the Second Degree with Sexual Motivation. CP 67-69.

A jury trial was held on May 28-29, 2013, RP I 36-247, RP II 12-260. The jury returned verdicts of Guilty as to Count One (Rape of a Child in the Third Degree), Not Guilty as to Count Two (Rape in the Second Degree), and Not Guilty as to Count Three (Assault in the Second Degree with Sexual Motivation), CP 193-195, RP III 8-9.

Crowell was sentenced on July 11, 2013 within the standard range, CP 246-263, RP (July 11, 2013) 11-12.

2. SUBSTANTIVE FACTS

J.R. was fifteen years old in November-December 2012. RP II 57. On the night of Friday, November 30, 2012, she was at a

parade with her mother Sara Slack and with twin sisters named Kendra and Nicky Latimer, RP II 62.

Kendra Latimer was a close friends of Slack's and was "kind of like family" to J.R. RP II 62-63. J.R. called her "Aunt Kendra". RP I 178, RP II 63. Kendra invited J.R. to stay with her over the weekend, and J.R. agreed with her mother's permission. RP II 65. J.R. rode with Kendra to her home that night. RP II 66. Kendra also had over her two young nieces, ages approximately seven and four. RP II 65.

While J.R. was hanging out with Kendra and her nieces, Crowell came over. RP II 68-69. All of them talked and watched television for about an hour before Crowell went out and got pizza, which they all shared. RP II 69-70, 74. Crowell also brought alcoholic beverages. RP II 80-81. J.R. drank two or three of them with Kendra's permission. RP II 81-82.

The little girls fell asleep, one in J.R.'s lap and one in Kendra's lap. RP II 74-75. Kendra had also fallen asleep. RP II 75, 161. J.R. took both girls and put them into bedrooms. Id. After waking up, Kendra went into her bedroom and went to bed. RP II 75-77, 169. Crowell and J.R. continued talking in the living room. RP II 77-78.

At a certain point, Crowell asked J.R. if she wanted to go on a quick drive, and J.R. agreed. RP II 83-84. They drove to Blue Hole in Carson, Skamania County, Washington. RP II 85. This is "kind of like a gravel muddy road" with trees and trails. RP II 88. Only one road is accessible by car, and it ends in a cul-de-sac with a walking trail down to a body of water. Id.

Crowell drove with J.R. down to the cul-de-sac, where there was a white truck. RP II 89. He then turned around and drove into a pull-off, where he pulled over and stopped the car. RP 89-91. Crowell was driving with J.R. in the passenger seat. RP 89.

Crowell did not answer J.R.'s question about where they were going but sat in the car listening to music on the radio. RP II 93. He then told J.R. to get in the back seat, and she complied out of fear. Id. Meanwhile, Crowell was going through the glove compartment and the middle console. RP II 94. (He later told J.R. that he had been looking for a condom. RP II 94-95.) He then joined J.R. in the back seat. RP II 95.

Crowell then told J.R. to take her clothes off. RP II 96. J.R. asked him why and refused. Id. But Crowell persisted, and J.R. ultimately started taking off her clothes. RP II 96-97. Crowell reached around and helped her take them off. RP II 97. J.R.

complied because Crowell kept telling her to take off her clothes, and she was scared. Id.

Crowell put a car seat onto the floorboard of the back seat, crawled into a position with his knees on the seat of the car, and started taking off his own clothes. RP II 98.

Crowell continued trying to take off J.R.'s clothes, but now, J.R. was trying to push him off of her. RP II 101. He was putting his hands up her leg and shirt, and J.R. told him to stop repeatedly. Id.

Crowell positioned his body on top of J.R.'s legs while her back was up against the back right passenger door. RP II 102. She had ended up that way while fighting against Crowell's trying to take her clothes off. RP II 102. She kept trying to push Crowell off by his upper shoulders. RP II 101-102. She also tried to open the car door by reaching an arm behind her but was unsuccessful because she could not move her arm well with Crowell on top of her. RP II 102-103.

By this point, Crowell was positioned over most of J.R.'s body. RP II 103. At a certain point, she stopped trying to open the car door and instead tried to get her arm out from behind her so she could use both hands to try to push Crowell off of her. RP II

103-104. She was pushing as hard as she could at Crowell's shoulders but could not push him off. RP II 104.

Crowell started putting his hand down J.R.'s shorts and was trying to take off J.R.'s shirt with his other hand. RP II 105. He successfully took off her shirt because J.R. was "fidgeting" and "squirming" in an unsuccessful attempt to make more room and see if she could get out, and Crowell was able to get the shirt over J.R.'s head and through her hands. RP II 105-106. Crowell also took off J.R.'s shorts. RP II 106. He took off J.R.'s bra, RP II 107, and underwear, RP II 108. She was completely naked at this point. RP II 108-109. Her shoes, which were mere slip-on shoes with no back, fell off. RP II 114-115.

Crowell also took off his own clothes. RP II 111. First, he took off his shirt while still on top of J.R., RP II 111, and then he took his pants off after "kind of scoot[ing] off" her legs, RP II 112. He was still, however, sitting on her feet, and J.R. was unable to pull them out from under him. RP II 113.

Crowell then sat up and pulled J.R.'s legs over his shoulders, put his head between her legs, and his mouth on her vagina, licking it. RP II 109-110. This went on for a minute or two. RP II 110.

Crowell then pushed J.R.'s legs off of him, pushed her to the side and shoved her head into his lap, trying to put her mouth on his penis. RP II 110-111, 113, 115. He was sitting upright, facing forward. RP II 113.

Overpowering J.R.'s attempts to push back with her head, Crowell successfully put her head in his lap. RP II 116. Her mouth went around his penis. RP II 116. She opened her mouth out of fear after about 30 seconds because Crowell kept trying to shove her head down there and was telling her to open her mouth. RP II 116-117. Her mouth was around his penis for about a minute or two while Crowell moved her head back and forth. RP II 117. He did not ejaculate. Id.

Then Crowell let go of J.R.'s head, and J.R. sat up. Id. She was situated against the passenger side door, and Crowell got on top of her, trying to get in between her legs. RP II 117-118. But "he had a difficult time," so he sat up and pulled J.R. onto his lap, RP II 119, facing toward him, RP II 121. He pushed his penis into her vagina and was moving the bottom half of body up and down. RP II 119. With his hands around J.R.'s waist, he was also trying to move her up and down, RP II 119-120. This went on for about 15

to 20 minutes. RP II 120. Crowell did not ejaculate. RP II 121-122.

All of a sudden, Crowell stopped and pushed J.R. off of him. RP II 122. He stepped out of the car and put on his clothes, threw J.R. her clothes, and told her to put them back on. RP II 122-123. She dressed in the back seat, then stepped out of the car and got in the front seat. RP II 124. Crowell was already there, and they immediately headed back to Kendra's house. RP II 124-125. It was still dark out. RP II 125.

While driving back to Kendra's, Crowell told J.R. to take a shower, make sure she was clean, and not tell anyone. RP II 125.

Kendra's door was unlocked. RP II 127. J.R. went inside and took a bath. RP II 127, 170. Kendra's bedroom door was closed. RP II 127. Meanwhile, Crowell stayed outside, RP II 128, but was back inside after J.R. finished her bath, RP II 132. J.R. did not wake up Kendra because J.R. was embarrassed and did not want to tell Kendra what had occurred. RP II 131, 136. She did not tell her mother because she was not very close with her mother, and they did not talk about many things. RP II 132.

J.R. and Crowell both fell asleep inside Kendra's living room. Id. J.R. continued to hang out with Kendra all weekend, RP II 134.

Crowell left on Saturday, RP II 135, but came back on Saturday night, even though Kendra said he was not coming back, RP II 137. He left again on Sunday but again came back at night, even though Kendra said he was not coming back, RP II 139-140.

Kendra took J.R. to school on Monday morning. Somehow, a girl named Sydney Valier heard what had happened and asked J.R. if she had sex. RP II 141-142, 198. J.R. "said well kinda," and "yeah, well I lost my virginity," RP II 142, 199. She did not say she was raped because she "was embarrassed" and "didn't want anyone to know," RP II 199.

By the end of the day, J.R. could hear quite a few others talking about her having "had sex with an older guy," RP II 143. At that point, J.R. only confirmed that she had lost her virginity but did not say that she was raped because she "didn't want everyone knowing" and "was embarrassed of what had happened," RP II 201.

The next day, Stacie Bondurant asked J.R. about the incident. RP II 143. First, J.R. told Stacie that she had had sex, but when Bondurant kept asking J.R. questions about it, J.R. told her that she was raped, RP II 144.

When others at school asked J.R. about the incident, J.R. would shake her head, nod, and say yes, that she had been raped. Id.

J.R. got an anonymous note at school accusing her of making up the incident. RP II 145. She found out that a student named Brooke Lyddon wrote the note, RP II 145-146. Brooke informed Crowell of what was being said, RP II 146. Crowell told Kendra. RP I 209, RP II 147.

On December 5, 2012, RP I 60-62, RP II 28, Kendra texted Slack that J.R. was making allegations about Crowell. RP II 28-29, RP I 204, 209-210. According to Latimer, Crowell was getting text messages about J.R.'s allegations. RP I 209.

Slack called Latimer, and they engaged in a brief conversation during the work day and a longer conversation after 5:00 PM. RP II 29-30. In one of the conversations, Crowell was with Latimer, and both Latimer and Crowell were telling Slack that J.R. was telling people at school she had had sex with Crowell. RP II 30.

Slack called her boyfriend Chris Smiley and told him what she had heard. RP II 22-23, 33-34, RP I 122-123. Smiley called J.R. and asked her about it, at which point J.R. "started hysterically

bawling on the phone," RP I 124. Initially, she denied that anything had happened, RP I 127, 138, RP II 148. Smiley told her he did not think she was being honest with him, RP I 128.

When Slack got home, she confronted J.R., who "just ran to her room and started crying," RP II 34. When Smiley got home, he and Slack talked to J.R., but J.R. did not want to talk about it in front of her mother, RP I 125-126. RP II 36-37, 147, 149. She would not say anything to Slack but "was just sitting there crying," RP II 37. Slack left the room. RP I 126. RP II 36-37. However, she could still hear some of what was going on between her daughter and Smiley. RP II 38.

Smiley told J.R. that he needed to know what had happened. RP I 126. J.R. was "crying" and "[u]pset," to the point "where she couldn't really talk," RP I 127, RP II 38. Smiley tried to have J.R. talk for five to ten minutes, but was unsuccessful since J.R. was "bellowing and crying," RP I 129, RP II 38. So at Smiley's suggestion, J.R. wrote down what had happened, RP I 127, RP II 38-40, 150.

After both Smiley and Slack read what J.R. had written, they decided to call the Sheriff's Office. RP I 128, RP II 40, 149-150.

Skamania County Sheriff Deputy Mike Hepner was dispatched to this call, RP I 60-62, 134, RP II 40, 150.

After speaking briefly with Slack and Slack's boyfriend Chris Smiley, RP I 64, RP II 40-41, Deputy Hepner turned his attention toward J.R., RP I 65-66, 134. J.R. started "crying out of control . . . [w]hen she began to describe what happened to her," RP I 67. She continued crying when getting "to something that bothered her," Id.

J.R. told Deputy Hepner a summary of what had happened to her, RP I 67-74, RP II 150-151. It was not Deputy Hepner's intention to take a detailed statement because he planned to pass the case on to a detective trained for interviewing juveniles in sex cases, RP I 69-70, RP II 151. During the brief interview, which lasted 10-15 minutes, RP I 74, there were points where she started crying "hysterically" or "extensively," RP I 70-72, to the point where tears were "flowing down her face" and she could not speak, RP I 78.

During this brief interview, Deputy Hepner asked J.R. if she and Crowell had anal sex, and J.R. said yes. RP I 72. However, Deputy Hepner did not explain to J.R. what that meant, Id., and was not sure if she understood, RP I 64. Also, while Deputy Hepner initially tried to take just a narrative statement from J.R., he started

asking simple yes or no questions when she became "so upset," RP I 73.

The next day (December 6, 2012), Skamania County Sheriff Det. Tim Garrity began to follow up on the investigation commenced by Deputy Hepner, RP I 84. Det. Garrity has specialty training in child interview techniques and has taken "specialty classes in crimes against children and sexual assaults," RP I 81. He has investigated approximately 300 sexual assault and other cases involving children.

Det. Garrity conducted a detailed recorded interview with J.R. that afternoon, RP I 88-89, 94-97, RP II 152. During this interview, J.R. was also "[p]retty tense, upset, at times had difficult talking about certain things," RP I 90. She was emotional throughout the interview, RP I 91.

Det. Garrity recommended that J.R. go to a medical facility and obtain a sexual assault exam, RP I 106.

On December 6, 2012, J.R. was examined by Dr. Linnea Wittack, RP I 219. Dr. Wittack is a pediatric emergency physician. RP I 216. Her specialty is children's emergency medicine, including situations where children may have been victims of sexual assault, RP I 218.

J.R. told Dr. Wittack that she had been raped and provided some of the details. RP I 221-222.

A "rape kit" to look for Crowell's DNA on J.R.'s body was not done because in Washington, this kit needs to be done within 120 hours of the incident, and more time than that had already passed. RP I 225. Dr. Wittack did conduct an external vaginal and rectal exam. RP I 225. The examination did not confirm or negate J.R.'s accounting of being sexually assaulted. RP I 227-229, RP I 232-233.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING IN EVIDENCE, UNDER THE "EXCITED UTTERANCE" EXCEPTION TO THE HEARSAY RULE, A RECORDED OUT-OF-COURT STATEMENT MADE BY THE COMPLAINING WITNESS J.R.

A. SINCE THE COMPLAINING WITNESS J.R. TESTIFIED AT TRIAL, THERE WAS NO CONSTITUTIONAL VIOLATION OF CROWELL'S RIGHT TO CONFRONT WITNESSES.

A criminal defendant has a right "to be confronted with the witnesses against him," U.S. Const., Amendment VI. However, this amendment does not bar hearsay testimonial statements made by a witness who in fact testifies at trial. See State v. Crawford, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ("[W]hen the

declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.).

This is true at minimum where the declarant testifies as to the relevant evidence which will be the case here. See dicta in State v. Williams, 137 Wn. App. 736, 745, 154 P.3d 322 (2007), quoting State v. Rohrich, 132 Wn. 2d 472, 475, 939 P.2d 697 (1997) ("The opportunity to cross-examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross-examine if he so chooses....").

Since in this case, the complaining witness J.R. testified for the State at trial, RP II 56-160, and was cross-examined, RP II 160-168, there is no Constitutional bar to the admission of her hearsay statements.

**B. THE RECORDED STATEMENT OF THE
COMPLAINING WITNESS J.R. WAS PROPERLY
ADMITTED UNDER THE "EXCITED UTTERANCE"
EXCEPTION TO THE HEARSAY RULE.**

Det. Garrity conducted a recorded interview with J.R., RP I 88-89. The jury was allowed to hear part of the recording of this

interview, RP I 94-97. Crowell argues that it "was inadmissible hearsay," Brief of Appellant at 19.¹

However, the recorded statement, while hearsay, was admissible under ER 803(a)(2), which provides a hearsay exception for:

[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

ER 803(a)(2) permits statements "made while under the influence of external physical shock" to be admissible if made "before the declarant has time to calm down enough to make a calculated statement based on self interest." State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997).

The three requirements to satisfy the "excited utterance" exception are:

First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Third, the statement related to the startling event or condition.

¹ Crowell mistakenly refers to the interview as "video-taped," Brief of Appellant at 19, when in fact it was only audio-taped.

State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). The basic premise of the rule is that the speaker has no opportunity to lie before making the utterance. State v. Briscoeray, 95 Wn. App. 167, 172, 974 P.2d 912 (1999), review denied, 139 Wn.2d 1011, 994 P.2d 848 (1999).

The passage of time between the startling event and the declarant's statement is only one factor to be considered in determining whether the statement is an excited utterance. State v. Strauss, 119 Wn.2d 401, 416-417, 832 P.2d 78 (1992), citing State v. Woodward, 32 Wn. App. 204, 206-207, 646 P.2d 135 (1982), review denied, 97 Wn. 2d 1034 (1982), superceded by statute as stated in State v. Ramirez, 46 Wn. App. 223, 230-231, 730 P.2d 98 (1986).

The passage of time alone is not dispositive. State v. Thomas, 46 Wn. App. 280, 284, 730 P.2d 117 (1986), aff'd., 110 Wn.2d 859, 757 P.2d 512 (1988). The key is

whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.

Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969).

Washington courts have allowed statements made hours after the startling events.²

In Strauss, a statement made to a police officer three and one half hours after a sexual assault was upheld as an excited utterance, 119 Wn.2d at 416-417. There the court noted the victim was crying and upset at the time she gave the statement and appeared to be in a state of shock. Id. at 416.

In Thomas, a statement made six to seven hours after a sexual assault was upheld as an excited utterance, 46 Wn. App. at 283-285. The Thomas court relied on the fact the victim was upset and crying, and her responses were not the product of leading questions. Id. at 285. The Thomas court also noted that "[w]hile several hours elapsed prior to the call, several of them were spent sleeping in the home of the alleged perpetrator." Id.

In order to qualify as an excited utterance, the startling event or occurrence need not immediately precede the statement.

²See, for example, State v. Flett, 40 Wn. App. 277, 287, 699 P.2d 774 (1985)(statements made 7 hours after the event admissible "based on the continuing stress experiences and exhibited by the victim"); State v. Fleming, 27 Wn. App. 952, 955-956, 621 P.2d 779 (1980), review denied, 95 Wn.2d 1013 (1981), disapproved on other grounds, State v. Osborn, 59 Wn. App. 1, 7, 795 P.2d 1174 (1990)(three to four hour delay).

"Although the statement must be made while the declarant is still under the influence of the event, an excited utterance need not be contemporaneous to the event." State v. Robinson, 44 Wn. App. 611, 615-16, 722 P.2d 1379 (1986), review denied, 107 Wn.2d 1009 (1986), citing State v. Doe, 105 Wn.2d 889, 893, 719 P.2d 554 (1986).

It is equally clear, however, that the timing is a relevant factor, and that "[i]deally, the utterance should be made contemporaneously with or soon after the startling event," Chapin, Wn.2d at 688.

This is because as time between the event and the statement lengthens, the opportunity for reflective thought arises and the danger of fabrication increases.

Id.

Responses to questions may be admissible. Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 369, 966 P.2d 921 (1998), citing Robbins v. Greene, 43 Wn. 2d 315, 321, 261 P.2d 83 (1953). In fact, declarations have been found to be admissible even when there is intervening conversation with others. In State v. Majors, statements made to a police officer 20 minutes after an assault were properly admitted as excited utterances even though the

victim had previously spoken to other witnesses and to the 911 operator, 82 Wn. App. 843, 848-849, 919 P.2d 1258 (1996), review denied, 130 Wn.2d 1024, 930 P.2d 1230 (1997). The court noted that the ruling was based on victim's "'visibly shaken' demeanor, her youth, and the relatively small amount of time between the incident and the declaration." Id. at 848.

Here, while six days had elapsed between the alleged rape and the recorded statement to Det. Garrity,³ J.R. was "[p]retty tense, upset, at times had difficulty talking about certain things," RP I 90, was emotional throughout the interview, and cried, RP I 91. Her statement therefore meets the foundational requirements for an excited utterance.

C. THE ADMISSION OF EXCITED UTTERANCES IS NOT REVERSED UNLESS THE TRIAL COURT ABUSES ITS DISCRETION.

The admission of "excited utterances" will not be reversed unless the trial court has abused its discretion. Strauss, 119 Wn.2d

³ In United States v. Napier, 518 F.2d 316, 317-318 (9th Cir. Or. 1975), cert. denied, 423 U.S. 895, 96 S. Ct. 196, 46 L. Ed. 2d 128 (1975), the United States Court of Appeals for the Ninth Circuit (Oregon) upheld the admission of an excited utterance made when the declarant viewed a photograph of her assailant approximately eight weeks after the assault and cried out, "He killed me, he killed me." The Court ruled in that case, however, that the required startling event was the display of the photograph. Id. at 318. In State v. Ramirez-Estevez, 164 Wn. App. 284, 292, 263 P.3d 1257 (2011), review denied, 173 Wn.2d 1030, 274 P.3d 374 (2012), the Washington Court of Appeals rejected a comparison to Napier

at 417 (1992). A trial court abuses its discretion when it acts on untenable grounds or for untenable reasons or when its decision is manifestly unreasonable. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), superceded on other grounds, Seattle Times Co. v. County of Benton, 99 Wn.2d 251, 263, 661 P.2d 964 (1983).

Since the trial court had tenable grounds to admit J.R.'s recorded statement, and its decision was not manifestly unreasonable, its ruling allowing the evidence to be admitted should not be disturbed on appeal.

The statement here is distinguishable from the one rejected as an excited utterance in State v. Brown, 127 Wn.2d 749, 757-759, 903 P.2d 459 (1995), cited in Brief of Appellant at 20-21, because in Brown, the trial court admitted a 911 call, part of which the declarant admitted during her testimony was false, Id. at 753. No such thing happened here.

**D. EVEN IF THE RECORDED STATEMENT OF THE
COMPLAINING WITNESS J.R. WERE
IMPROPERLY ADMITTED, ANY ERROR WAS
HARMLESS.**

with respect to a two-year delay, stating, "The two-year delay here . . . eclipses the eight-week delay in Napier."

Even if the trial court did wrongfully admit the recorded statement of J.R., the error was harmless. "An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997), overruled on other grounds, State v. Sledge, 83 Wn. App. 639, 922 P.2d 832 (1996) [citation omitted].

Non-Constitutional violations of an evidentiary rule are "not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred," Id., quoting State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.

Id. [citation omitted]

Here, since J.R. testified, the admission of a short part of her recorded statement (less than four pages out of a nearly four-hundred page transcript) could not have materially affected the guilty verdict. Similarly, in Majors, 82 Wn. App. at 848-849, the Court of Appeals did not find an abuse of discretion in the

admission of an excited utterance partially because the statement was "cumulative of other testimony," including that of the declarant.⁴

Finally, Crowell places great weight on alleged inconsistencies with different version of J.R.'s story. See Brief of Appellant at 10-14, 21-23. However, this cuts both ways. Inconsistent versions of the same story could have caused the jury to question J.R.'s credibility.

In fact, Crowell's trial counsel argued this effectively during her closing argument:

Her times that she testified to or admitted to that were testified to are kind of all over the map. . . . Deputy or Det. Garrity told, she told 2:00 in the morning. She admitted in an earlier interview, she nailed it down to 11:00 and 11:30 and then today during the state's interview [sic] with her she couldn't remember, she couldn't remember, but in the earlier interview she said I looked at the clock, I remember looking at the clock and it was 11:00 or 11:30.

. . .

In terms of her being in the car, there's a couple new pieces of information that we didn't hear from her mom, we didn't hear from Mr. Smiley, . . . we didn't hear from Det. Garrity that the piece that's interesting is that the defendant, at the beginning of their interaction in the back of the car, climbed on top of one of the car seats with the door closed behind him and removed the car seat while he was on top of it so removed the belt from it, removed the car seat and

⁴ The Court of Appeals also based this ruling "particularly because this was a bench trial in which the court is presumed to give evidence its proper weight," Id.

put it down on the floor while he was in the back seat, she was in the back seat, he was in the back seat, he was on top of the car seat and then he removed it from the seat and put it on the floor. That's a brand new piece of information and you'll have to ask yourselves is that plausible.

The other piece of information that came up today that neither her mom nor Mr. Smiley nor Dep. Hepner nor Det. Garrity told us about was that towards the end of their interaction he pulled her so he's now sitting and Mr. Crowell allegedly pulled her up on his lap and is pushing her up and down . . .

RP II 247-249.

These inconsistencies may have been one reason the jury returned verdicts of Not Guilty on the two more serious counts, CP 194-195. Certainly, this did not *prejudice* Crowell or make it more likely that he was found Guilty of the one count, CP 193.

2. TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO THE ADMISSION, UNDER THE "EXCITED UTTERANCE" EXCEPTION TO THE HEARSAY RULE, OF AN OUT-OF-COURT STATEMENT MADE BY THE COMPLAINING WITNESS.

Both Chris Smiley and Sara Slack were allowed to testify as to the contents of a written statement made by J.R. as to the incident with Crowell. RP I 130-133, RP II 38-40. Crowell's trial counsel did not object. Crowell argues that this constitutes ineffective assistance of counsel. Brief of Appellant at 24-25.

To sustain a claim of ineffective assistance of counsel, the appellant must prove that counsel's representation was "deficient" and that the "deficient" representation "prejudiced the defense." State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987), citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), rehearing denied 467 U.S. 1267, 104 S. Ct. 3562, 82 L.Ed.2d 864 (1984).

To satisfy the first deficiency prong, the appellant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Thomas, 109 Wn.2d at 225, quoting Strickland, 466 U.S. at 687. "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Id. at 226. As for the second prong,

an appellant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694.

More specifically, where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct,

[citation omitted] (2) that an objection to the evidence would likely have been sustained, [citations omitted] and (3) that the result of the trial would have been different had the evidence not been admitted, [citation omitted].

State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998)

Crowell cannot meet any of these three prongs.

a. THERE WAS A LEGITIMATE STRATEGIC OR TACTICAL REASON FOR TRIAL COUNSEL NOT TO OBJECT TO THE ADMISSION OF THE OUT-OF-COURT STATEMENT.

As argued in Section One above, the alleged inconsistencies between the different versions of J.R.'s story cut both ways. Trial counsel may have wanted to get various versions before the jury in order to make the argument she indeed did make during closing argument pointing up the inconsistencies:

So it's like fighting a ghost when it's all over the map, how does one know exactly how to match up the other stories. How to match up what Kendra Latimer experienced or was, you know, how to match up when were they there, when were they not there.

RP II 247.

b. AN OBJECTION TO THE EVIDENCE WOULD LIKELY NOT HAVE BEEN SUSTAINED.

Had trial counsel objected to the admission of testimony from Smiley and Slack as to the contents of a written statement made by J.R., the objection would likely not have been sustained.

The trial court allowed in as excited utterances J.R.'s statement to Deputy Hepner, RP I 67-74, and her recorded statement to Det. Garrity, RP I 94-97. Similarly, there is no reason the trial court would not have allowed Smiley and Slack to testify as to the contents of J.R.'s written statement for the same reason, since the context of this statement was that J.R. was "crying" and "[u]pset," to the point "where she couldn't really talk," RP I 127. Though Smiley tried to have J.R. talk for five to ten minutes, he was unsuccessful since J.R. was "bellowing and crying," RP I 129.

Furthermore, for the same reasons stated in Section 1 above, the trial court properly admitted the contents of J.R.'s written statement to Smiley and Slack as an excited utterance under these circumstances. The proper foundation was there.

J.R.'s written statement is distinguishable from the one disapproved of in State v. Dixon, 37 Wn. App. 867, 684 P.2d 725 (1984), cited in Brief of Appellant at 25-27, for the following reasons:

- In Dixon, the statement was four pages long and took the declarant about two hours to write, 37 Wn. App. at 871, whereas J.R.'s statement took her 15 minutes to write, RP I 127, and was a mere page and a half long, RP I 130. This

is particularly important because the Court of Appeals in Dixon commented that the statement at issue there, "because of its length and completeness, would be impossible to distinguish from a statement routinely given police by crime victims," 37 Wn. App. at 873.

- In Dixon, the entire written statement was marked as an exhibit and apparently read into the record, 37 Wn. App. at 870, whereas J.R.'s written statement no longer existed at the time of trial, RP II 40, and Smiley and Slack merely testified to what they recalled it's having said, RP I 130-133, RP II 38-40.
- In Dixon, the statement was made to a police officer as part of her investigation, 37 Wn. App. at 869-870, whereas J.R.'s statement was taken by her mother's boyfriend Chris Smiley, RP I 129-133.
- Smiley had J.R. write out her statement because J.R. was literally incapable of stating what happened orally, RP I 129, whereas in Dixon, the Court only states that "the police officers made efforts to get Ms. M to calm down and at the same time took from her a written statement containing the details of the attack," 37 Wn. App. at 869-870.

c. THE RESULT OF THE TRIAL WOULD NOT HAVE BEEN DIFFERENT HAD THE STATEMENT NOT BEEN ADMITTED.

Finally, even if there were error in allowing Smiley and Slack to testify as to the contents of J.R.'s written excited utterance, the error, as the Court of Appeals ruled in Dixon, supra., was harmless:

. . . [T]his was a trial to the court, which raises the question as to whether the error was harmless. The trial judge heard essentially the same details testified to by Ms. M. as were included in the written statement. . . . The error involved here was not of constitutional dimension. Therefore, the error is not prejudicial if, within reasonable probabilities, the error did not affect the outcome of the trial.[citation omitted] It is highly probable that the trial judge would have reached the same result in this case even if the 4-page written statement of Ms. M. had been rejected. We find the error was harmless.

37 Wn. App. at 874-875.

Similarly, in Crowell's case, the guilty verdict would have been the same had Smiley and Slack not been allowed to testify as to the contents of J.R.'s written excited utterance. The challenged testimony constitutes seven pages out of a nearly 400-page transcript, RP I 130-133, RP II 38-40.

The case did revolve around the credibility of J.R., who testified in court, RP II 56-171. The jury was therefore able to assess her credibility directly, and any discrepancies between her

in-court testimony and admitted excited utterances would have counted against her, as argued effectively by Crowell's trial counsel, RP II 247-249. This may have been a reason the jury returned verdicts of Not Guilty on the more serious charges, CP 194-195, but there is no reason to think the Guilty verdict would have been any different had these statements not been admitted.

D. CONCLUSION

The trial court did not abuse its discretion in admitting an excited utterance recorded statement, and Crowell's trial counsel was not ineffective in failing to object to the admission of another excited utterance statement. Therefore, Crowell's guilty verdict should be upheld.

DATED this 13th day of June, 2014

RESPECTFULLY submitted,

By: 

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Chief Deputy Prosecuting Attorney
Attorney for the Respondent

CERTIFICATE OF SERVICE

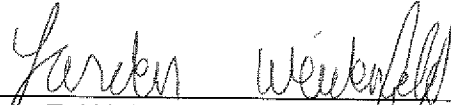
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